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IN THE

Supreme Court of the United States

OCTOBER TERM—1959

No. 702

JOHN WILLIAM MILLS,

Petitioner,

against

PANAMA CANAL COMPANY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Petitioner prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in the above entitled case on November 16, 1959.

Questions Presented

1. Is the conflict of decision between that of the Court below and the decision in the New York Court of Appeals such as to warrant the clarification of the applicable rule of law by the Supreme Court of the United States?

2. Should the choice of forum continue to exist so that a litigant by choosing jurisdiction of the State Court of New York be entitled to different benefits than a litigant in a Federal Court?

Opinion Below

The lower Court held that the petitioner, as a seaman employee of a Government agency enjoying the benefits of the Federal Employees' Compensation Act, had a remedy as against the company under such Act and not under the Jones Act. This opinion is reported at 272 F. 2d 37 (Appendix, pp. 5-8).

Jurisdiction

The judgment of the United States Court of Appeals for the Second Circuit was entered on November 16, 1959.

The jurisdiction of this Court is invoked under 28 U. S. C. A. Section 1254(1).

Statement

Petitioner, a seaman employed by the respondent, brought an action to recover damages for injuries sustained while aboard the S.S. CRISTOBAL on September 24, 1955.

The action was predicated on the provisions of the Jones Act, 46 U. S. C. A. Section 688.

The opinion of the Court below is reported at 272 F. 2d 37. It holds as follows at page 39:

> "As a result of accepting employment with Panama Canal Company plaintiff became, in effect, an employee of the United States and entitled to all the FECA benefits granted to him by congressional enactment. He is not privileged to accept this status and at the same time claim rights which could only be derived through some other and different status."

Reasons for Granting the Writ

The Court of Appeals of the State of New York in the case of *Wagner* v. *Panama R. Co.*, 299 N. Y. 432; 87 N. E. 2d 444 (1949) determined that a seaman injured on the S.S. CRISTOBAL, the same ship involved in this action, was entitled to maintain an action for damages under the Jones Act, and that the Federal Tort Claims Act did not affect such rights even though the S.S. CRISTOBAL was at that time owned by the United States. The accident in this *Wagner* case occurred on March 29, 1947, some short time prior to the enactment of the Federal Employees' Compensation Act involved herein.

There is no distinction between the two cases, except that the New York Court of Appeals has determined that the Jones Act is applicable while the lower Court in this case adopts a contrary conclusion.

This conflict of decision warrants a clarification of the applicable rules of law by this Court.

The Courts of the State of New York must follow the doctrine of the *Wagner* case, thereby permitting an injured seaman to secure different benefits than a similar litigant in a Federal Court.

Errors Complained of

The Court below should have adopted the rule of law of the New York Court of Appeals in the *Wagner* case, *supra*.

Argument

There are two conflicting rules of law applied to identical facts, one by the New York Court of Appeals and the other by the United States Court of Appeals for the Second Circuit.

Conclusion

Under such circumstances, it is respectfully submitted that a Writ of Certiorari be granted so that the issues herein may be fully presented for the determination of this Court.

Respectfully submitted,

JACOB RASSNER,
15 Park Row,
New York, New York,
Attorney for Petitioner.

APPENDIX

(Opinion of the United States Court of Appeals for the Second Circuit)

Before CLARK, Chief Judge, MOORE, Circuit Judge, and SMITH, District Judge.

LEONARD P. MOORE, Circuit Judge.

Plaintiff, a seaman, employed by defendant, brought this action to recover damages for injuries allegedly sustained at the port of Colon, Panama, while performing his duties on the S.S. Cristobal, a vessel owned and operated by defendant. He claims a right to maintain the action under the provisions of the Merchant Marine Act, commonly referred to as the Jones Act (46 U. S. C. A. § 688). Defendant amongst other defenses alleged that the court lacked jurisdiction over defendant and the subject matter of the action because "at the time of the alleged injury, plaintiff was an employee of the Panama Canal Company, a Government corporation, and that by reason thereof plaintiff's sole and exclusive remedy lies under the Federal Employees' Compensation Act, as amended, 5 U. S. C. [A.] § 751 et seq." On this ground defendant moved to dismiss the complaint. The court granted the motion. From the judgment of dismissal, plaintiff appeals.

Defendant, Panama Canal Company, is a corporation the stock of which is wholly owned by the United States, the Secretary of the Army being designated as the sole stockholder. Panama Railroad Company (name changed to Panama Canal Company, Act of September 26, 1950, 64 Stat. 1038) was incorporated under federal charter (Act of June 29, 1948, 62 Stat. 1075).[1] It is the governmental agency through which the United States carries

[1] A predecessor corporation had existed since 1849. The United States acquired all the capital stock during the period of construction of the Canal.

on the functions necessary for the operation and maintenance of the Panama Canal[2]—one of these functions is the ownership and operation of the S.S. Cristobal.

The primary question on appeal is whether plaintiff who as an employee of a governmental agency enjoys the benefits of the Federal Employees' Compensation Act (FECA) may also sue defendant under the Jones Act.

When the FECA was enacted in 1916 it specifically provided that the term "employee" should include employees of the United States and of the Panama Railroad Company." The amendment of 1949 (63 Stat. 854 et seq.) defined "employee" as embracing "employees of instrumentalities of the United States wholly owned by the United States."

Recently the Supreme Court granted certiorari (358 U. S. 898, 79 S. Ct. 223, 3 L. Ed. 2d 148) to resolve a conflict between this circuit and the Eighth Circuit on this very question. In Patterson v. United States, 2 Cir., 1958, 258 F. 2d 702, this court affirmed dismissals of libels filed by employees injured in the course of their employment with the United States while aboard vessels operated by the government and engaged in merchant service on the ground that their exclusive remedy was under the FECA. In Inland Waterways Corp. v. Doyle, 8 Cir., 1953, 204 F. 2d 874, the Eighth Circuit reached a contrary conclusion holding that an employee of a governmental agency although covered by the FECA could also maintain a suit.

The Supreme Court affirmed the dismissals in Patterson, [illegible], 359 U. S. 495, 79 S. Ct. 936, 3 L. Ed. 2d 971, rehearing denied 360 U. S. 914, 79 S. Ct. 1293, 3 L. Ed. 2d 1263, and

[2] For a more extensive statement of the activities of the Panama Railroad [Canal] Company and its governmental character, see People of State of New York ex rel. Rogers v. Graves, 1937, 299 U. S. 401, 57 S. Ct. 269, 81 L. Ed. 306; Panama Canal Co. v. Grace Line, Inc., 1958, 356 U. S. 309, 78 S. Ct. 752, 2 L. Ed. 2d 788.

referred to its decision in Johansen v. United States, 1952, 343 U. S. 427, 72 S. Ct. 849, 96 L. Ed. 1051, to the effect that the exclusive remedy for employees of the United States on government vessels engaged in public service is under the FECA. This conclusion was expanded "to cases where the government vessel is engaged in merchant service" (359 U. S. at page 496, 79 S. Ct. at page 937). The court held that "If civilian seamen employed by the Government are to be accorded rights different from or greater than those which they enjoy under the Compensation Act, it is for Congress to provide them" (359 U. S. at pages 496-497, 79 S. Ct. at page 937) [3]

Plaintiff relies heavily on the decision of the district court in Cordero v. Panama Canal Co., D. C. S. D. N. Y. 1959, 170 F. Supp. 234, wherein the court decided not to follow other decisions to the contrary in the same district (Scott v. Panama Canal Co., D. C. S. D. N. Y. 1959, 170 F. Supp. 737, and Mills v. Panama Canal Co., S. D. N. Y. 1959, Civ. 136-54). The court in Cordero stressed the similarity of the activities of the government corporation, Panama Canal Company, with those of private corporations engaged in similar commercial enterprises. In so doing it looked to the form rather than the substance of the operation. However, the question of who is the employer is not answered by saying a corporation without any inquiry as to the nature of ownership of the corporation. Here the corporation was wholly owned by the government and carrying on an essential governmental activity. The fact that as space permitted passengers and cargo were also carried on defendant's vessels was entirely incidental and secondary

[3] Congress clearly indicated that it did not intend that seamen should have both Compensation Act benefits and the right to suit. See War Shipping Administration Act, 57 Stat. 45, 50 U. S. C. A. Appendix, § 1291. In granting the right to sue it made such seamen ineligible under FECA.

to the main purpose. As to the similarity of method of hiring seamen, namely, through union hiring halls, the form of hiring does not change the character of the employer, the government.

The Cordero case also points to decisions at a much earlier date in which seamen were allowed to sue. However, these cases are not presently controlling. The Supreme Court recognizing the conflict has now resolved it. Having done so with respect to a governmental agency, Inland Waterways Corporation, which was operating a far more commercial business than the Panama Canal Company, its decision in the Patterson case clearly covers the present case.

[1-3] The fact that the government chooses to conduct the affairs relating to the Canal through a corporation does not alter its character as a governmental agency (Cherry Cotton Mills, Inc. v. United States, 1946, 327 U. S. 536, 66 S. Ct. 729, 90 L. Ed. 835, and Federal Crop Ins. Corp. v. Merrill, 1947, 332 U. S. 380, 68 S. Ct. 1, 92 L. Ed. 10. As a result of accepting employment with Panama Canal Company plaintiff became, in effect, an employee of the United States and entitled to all the FECA benefits granted to him by congressional enactment. He is not privileged to accept this status and at the same time claim rights which could only be derived through some other and different status.

The judgment is affirmed.

(Judgment)

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the sixteenth day of November, one thousand nine and fifty-nine.

Present:

HON. CHARLES E. CLARK,
Chief Judge,

" LEONARD P. MOORE,
" J. JOSEPH SMITH,
Circuit Judges.

JOHN WILLIAM MILLS,
Plaintiff-Appellant,

—v.—

PANAMA CANAL COMPANY,
Defendant-Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the Order of said District Court be and it hereby is affirmed.

A. DANIEL FUSARO,
Clerk.